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COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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TCEQ DOCKET NO. 2010-0837-WR

CHIEF CLERKS OFFICE

IN THE MATTER OF	§	BEFORE THE TEXAS COMMISSION
APPLICATION NO. 4340A OF THE	§	
CITY OF LUBBOCK TO AMEND	§	ON
WATER RIGHTS PERMIT NO.	§	
WRPERM 3985	§	ENVIRONMENTAL QUALITY

REPLY OF CLARK WOOD, JR. TO RESPONSES TO CONTESTED CASE HEARING REQUESTS

**I. BACKGROUND**

On April 27, 2004, Lubbock submitted Application No. 4340A to amend permit No. 3985, requesting authorization to divert and use *all* of its historic and future discharges of surface and groundwater - based return flows, including up to 10,081 acre-feet per year from its TPDES permit No. 10353-002, and to convey the return flows via the bed and banks of North Fork to two diversion points upstream of Clark Wood, Jr. and nearly every other superior permit and riparian right owner that has requested a contested case hearing.

The ED declared Lubbock's application administratively complete on October 12, 2004. Notice was mailed on December 22, 2004 and again on February 10, 2005. The ED mailed its original draft permit to the parties on November 17, 2009. On December 3, 2009, the ED mailed out a significantly revised draft permit. This matter is scheduled for TCEQ's consideration on January 26, 2010.

**II. ANALYSIS.**

**A. Applicable Law, Burden of Proof & Issues.**

Clark Wood, Jr. agrees with the ED and OPIC that TEX. WATER CODE Chapter 11, and 30 TEX. ADMIN. CODE Chapters 55, 80, 295, and 297 apply to the Commission's consideration of Lubbock's Application, and that Chapter 11 of the Texas Water Code and 30 TEX. ADMIN. CODE Chapter 55 govern the Commission's consideration of hearing requests on attempted amendments

to water right permit applications.

As the applicant, Lubbock has the burden to prove the merits of its proposed amendment. *See* 30 TEX. ADMIN. CODE § 80.17(a). More specifically, Lubbock must prove its proposed amendment will not adversely impact other water right holders or the environment. *See* 30 TEX. ADMIN. CODE § 297.45(d).

The Texas Water Code and TCEQ's regulations characterize the numerous issues that Lubbock must prove to satisfy its burden of proof. First, Lubbock must prove that its proposed amendment "shall not cause adverse impact to the uses of other appropriators." 30 TEX. ADMIN. CODE § 297.45(a).<sup>1</sup> Second, Lubbock must prove that its proposed amendment will not harm surface water and groundwater quality, groundwater uses, existing instream uses of the stream or river, aquatic and wildlife habitat, bays and estuaries, and instream flows necessary to support recreation, navigation, and federally listed species. *See* TEX. WATER CODE § 11.042©; 30 TEX. ADMIN. CODE §§ 297.47, 297.53-297.56.<sup>2</sup> Third, Lubbock must also prove that the necessary conditions, restrictions, limitations, and/or provisions reasonably necessary for the enforcement and administration of Texas' and TCEQ's water laws have been incorporated into the draft permit. *See* 30 TEX. ADMIN. CODE § 297.59(a).

Fourth, Lubbock must prove its proposed amendment would not be detrimental to public

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<sup>1</sup> Adverse impact to another appropriator includes: (1) the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; (2) increasing an appropriator's legal obligation to a senior water right holder; or (3) otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time of the appropriator's water right was granted. 30 Tex. Admin. Code § 297.45(a).

<sup>2</sup> Lubbock's proposed diversion is subject to any conditions that may address its impact on existing permits, certified filings, or certificates of adjudication, water quality, and instream uses. TEX. WATER CODE § 11.042©. Moreover, "[a]ssessment of water quality impacts shall consider the maintenance of State of Texas Surface Water Quality Standards provided by [30 Tex. Admin. Code] Chapter 307 . . . (relating to Texas Surface Water Quality Standards) and the need for all existing instream flows to be passed up to that amount necessary to maintain the water quality standards for the affected stream. Such flows may also be used to protect uses of existing, downstream water rights by providing water of a usable quality and to provide, in part, for the protection of vested riparian water rights and domestic and livestock uses." 30 TEX. ADMIN. CODE § 297.54(a).

welfare. *See* 30 TEX. ADMIN. CODE § 297.46. Fifth, Lubbock must also prove that it has provided sufficient evidence “that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 . . . .” 30 TEX. ADMIN. CODE §297.41. Sixth, Lubbock must prove that its has “completed and returned all Texas Water Development Board surveys of groundwater and surface water use required since September 1, 2001” and has “an approved regional water plan in accordance with TWC, §16.053(I) . . . .” 30 TEX. ADMIN. CODE §297.41. Finally, Lubbock must prove that its proposed amendment meets “all other applicable requirements” in Texas Water Code Chapter 11. TEX. WATER CODE § 11.122(b).

**B. Consistent with the ED and OPIC’s recommendations, Clark Wood, Jr. is an affected person entitled to a contested case hearing.**

Consistent with the ED and OPIC’s recommendations, Clark Wood, Jr. is an “affected person” entitled to a contested case hearing on Lubbock’s proposed amendment to its water right authorization. *See* 30 TEX. ADMIN. CODE §55.251. An “affected person” is one who one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. 30 TEX. ADMIN. CODE § 55.256(a).

In determining whether one is an affected person, all relevant factors shall be considered, including but not limited to, the following: (1) whether the interest claimed is one protected by the law under which the application will be considered; (2) distance restrictions or other limitations imposed by law on the affected interest; (3) whether a reasonable relationship exists between the interest claimed and the activity regulated; (4) likely impact of the regulated activity on the health, safety, and use of property of the person; (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application. 30 TEX. ADMIN. CODE § 55.256©. With limited exceptions not applicable here, an application to amend a certificate of adjudication or permit

is subject to all prior and vested riparian rights of others using water on the stream. *See* 30 TEX. ADMIN. CODE §297.44.

The ED and OPIC concluded that Clark Wood, Jr. is an affected person entitled to a contested case hearing because Clark Wood, Jr., as holder of a downstream water right, has an interest protected by law that could be affected by the application in a manner not common to the general public.

Clark Wood Jr.'s authorized diversion point from the North Fork is downstream from Lubbock's proposed diversion point. Clark Wood, Jr. depends on the full use of his ability to divert and use water from the North Fork of the Double Mountain Fork of the Brazos River for his ranching operation. As a result, his interests are clearly "protected by the law under which the application will be considered" and "a reasonable relationship exists between the interest claimed and the activity regulated." *See* 30 TEX. ADMIN. CODE §§ 55.256©; 297.44.

Lubbock's proposed diversion threatens to: (1) substantially reduce the amount of water available for diversion by Clark Wood, Jr.; (2) interfere with his established priority; and (3) impair his ability to conduct his operations on his land. Accordingly, the threatened impact to Clark Wood, Jr.'s "use of property" and "impacted natural resource" show that Clark Wood, Jr. is an affected person. *See* 30 TEX. ADMIN. CODE § 55.256©.

**C. Further argument and statement of position of Clark Wood, Jr.**

The relative rights and positions of Clark Wood, Jr. and R. E. Janes Gravel Co. are the same, and Clark Wood, Jr. adopts and incorporates the arguments and positions taken by R. E. James Gravel Co. as set out in its Reply To Responses To Contested Case Hearing Requests.

Simply put, the main objection that Clark Wood, Jr. has to the Application of the City of Lubbock was stated in his August 18, 2006, letter requesting a contested case hearing, to-wit:

that the requested amendment does not require the City to immediately divert and use the water discharged by it into the river. Without assurance that the discharges be immediately diverted, the flow of the river will be affected by the discharged water. If it can be discharged and not immediately diverted, it can conceivably cause flooding downstream, depending on when it is released into the river. If a "credit" can be claimed by the City for not immediately diverting the water discharged into the river, and then later it can claim a redemption of that "credit" by diverting water from the river perhaps in the dry season, such later diversion could conceivably dry the river flow completely to the detriment of the downstream riparian owners.

On Page 6 of the City of Lubbock's Response To Requests For Contested Case Hearing, the City argues that the diversions of Janes Gravel and Clark Wood, Jr.

"would only be the beneficiary of the surcharge to the North Fork resulting from the City's discharge of its developed water return flows, as this surcharge would alleviate some portion of the normal streamflow losses that occur in the North Fork, and whatever flow the City cannot capture and divert as authorized pursuant to the Draft Permit would otherwise remain in the North Fork and convey to the permitted diversion points for both Janes and Wood."

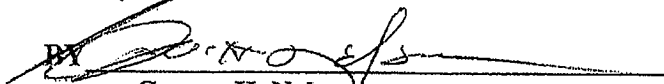
Obviously there are "two sides to the coin" concerning the effect on downstream riparian owners of "surcharges" the City "cannot capture and divert". If there is no requirement that the water injected into the river by the City be immediately diverted out of the river, there are definite effects on the flow of the river and the rights of downstream owners in varying degrees and at various times, and what the City calls a "beneficiary" could instead turn into a "victim". As far as can be determined, the accounting and metering plan mentioned by the City does not alleviate the problem or meet the objection being made that, to avoid ill effects on downstream owners, diversion of the water being discharged by the City has to be immediate or contemporaneous. It seems that it would be simple enough to explicitly provide that daily injection of the water and retrieval be immediate without the possibility of a carry over, delay or credit as stated above.

**III. CONCLUSION.**

Clark Wood, Jr. respectfully requests that the Commission find that Clark Wood, Jr. is an affected person and refer the matter to SOAH for a hearing on the merits in which Lubbock has the burden to prove whether its proposed amendment meets applicable rules and regulations provided in the Texas Water Code and Texas Administrative Code.

**Respectfully submitted,**

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**CERTIFICATE OF SERVICE**

I hereby CERTIFY that on January 12, 2011, a true and complete copy of the above was via the method indicated to counsel of record and others at the following addresses:

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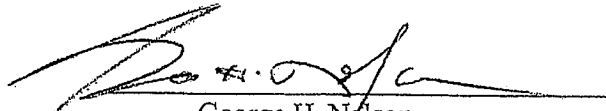
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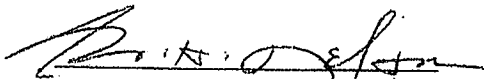
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